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IN THE

Supreme Court of the United States

OCTOBER TERM 1943.

No. 715

THE DIXIE MARGARINE COMPANY,
Petitioner,

vs.

A. H. SHAEFER, Formerly Deputy Collector of Internal Revenue for the District of Tennessee,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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A. H. SHAEFER, Formerly Deputy Collector of Internal Revenue for the District of Tennessee,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

Your petitioner, The Dixie Margarine Company respectfully prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered in the above cause December 1st, 1943, affirming the judgment of the United States District Court for the Western District of Tennessee, Western Division entered December 7th, 1942.

Opinion Below.

The District Court filed no opinion. The opinion of the Circuit Court of Appeals is reported in 139 F. (2) 221.

Jurisdiction.

The jurisdiction of this court is invoked under Sec. 240 (a) of the Judicial Code, as amended.

Statute Involved.

The statute whose construction is involved in this case is Sec. 3226 R. S. as amended by the Revenue Act of 1932, Ch. 209, 47 Stat. 169, Sec. 1103a, which reads as follows:

> "Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit shall have been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty or sum has been paid under protest or duress. No suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which suit or proceeding relates."

Questions Presented.

The question presented is whether it was the intention of Congress in enacting Section 3226 R. S. that there should be no exceptions to it and whether it should apply without variation in any respect in all cases, particularly where an executive officer wilfully and fraudulently falsified a statute and published the falsified version as a Regulation of his Department for the information of all parties concerned, intending that these persons should rely upon it as the law, thus concealing its falsity for many years, and under such falsified version collect illegally, large sums of money, and then after the time prescribed by such section for filing a claim for refund had expired, set up such section as a defense of the retention of such money by the government.

The question presented is whether in the case of actual fraud by a government official he becomes a constructive trustee for the taxpayer, and whether in such case in equity the analogy of the Statute of Limitations applies and equity cannot relieve.

Statement.

The facts of the case as set out in the bill of complaint (Rec. 2-11) very briefly are as follows: Petitioner, a Tennessee corporation in 1923 began the manufacture of a food product consisting of vegetable oils, salt, water, and skimmed milk, with or without coloring matter which is now commonly known as oleomargarine.

Respondent, a Deputy Collector of Internal Revenue at Memphis, Tenn., in charge of the sale of Revenue stamps, when called upon by the President of Petitioner told him that the product was oleomargarine, and the Petitioner

must secure a license as a manufacturer and also place stamps on all of the product manufactured and sold, and that a failure to do so would subject Petitioner to fines, imprisonment, and a seizure of the factory and goods. Respondent at that time gave Petitioner a copy of Regulations No. 9 of the Bureau of Internal Revenue and instructed that the business must be governed in accordance therewith. The factory was inspected by Revenue officials every three months, and a compliance with Reg. No. 9 required.

To avoid these penalties and solely because of such threats, Petitioner under duress and compulsion paid to Respondent large sums of money between 1923 and 1931. On Nov. 30, 1929 and on Sept. 14, 1931, Petitioner filed claims for refund of such sums which claims were wrongfully, illegally and fraudulently rejected by the Commissioner of Internal Revenue, and to protect its rights Petitioner filed a suit in the District Court of Tennessee for the recovery of such amounts. Petitioner cooperated with others in the industry and filed a suit entitled *Standard Nut Margarine Company of Florida* v. *Miller, Collector,* in which the District Court granted an injunction against the further collection of such amounts. The case was appealed to the Circuit Court of Appeals for the fifth circuit and that court sustained the decision of the District Court, (49 F (2) 79), and held such products not taxable as oleomargarine and stated that the Commissioner of Internal Revenue knew they were not taxable under the law and that his action in holding them so taxable was so unsubstantial as to be frivolous and was taken in contemptuous disregard of existing court decisions and was an attempt to coerce the payment of money illegally and that the holding that it was taxable was so arbitrary that it amounted to a

mere administrative fiat and that the claim that the product was taxable was merely colorable and a frivolous pretense that it was his official duty. The court further held that the Plaintiff was entitled to protection in equity and sustained the injunction restraining any further attempts on the part of the Commissioner to tax such products as oleomargarine.

The defendant appealed to this court and in *Miller* v. *Standard Nut Margarine Company of Florida*, 284 U. S. 498 this court upheld the decision of the Circuit Court of Appeals, decided such products were not taxable, that there was no law taxing them, that the Commissioner knew there was no such law and that his action in taxing them was without warrant, arbitrary, oppressive and without force.

The Commissioner then refunded all amounts for which claims for refund had been filed within the provision of Sec. 3226 R. S. but refused to return amounts paid in by Petitioner for the period preceding that covered by the claims filed which went back only four lears to 1925. Petitioner then filed a suit in the United States Court of Claims for the amount of $87,412 which had been paid in prior to that time but that court held it had no jurisdiction because no claim for refund had been filed in accordance with Sec. 3226 of the Revised Statutes.

From 1935 to the time of the filing of this suit Petitioner was engaged in constant litigation with the Bureau of Internal Revenue with respect to some part of these transactions. When that litigation was completed this suit was filed in equity on the theory that Respondent, in demanding, taking and retaining this money had deprived

Petitioner of its property without due process of law and had taken its private property for public use without just compensation and asked that the Respondent be declared a constructive trustee, for an accounting and restitution, further alleging that Respondent wilfully and fraudulently represented to Petitioner that such products were taxable as oleomargarine, at the time well knowing that such representations were false, and wilfully intended that Petitioner should pay over to him the said sum of $87,412. That Petitioner believed such representations of the Respondent to be true and as a result thereof paid over to the Respondent the said sum, the receipt of which gave him no right or title, but which was the property of Petitioner.

The Respondent filed a motion to dismiss (Rec. 12-14), which was sustained by the District Court (Rec. 15). No opinion was written. An appeal was taken to the Circuit Court of Appeals for the sixth circuit (Rec. 16). That court sustained the decision of the District Court on the ground that there had been no claim for refund in compliance with Sec. 3226 R. S.; that the facts as summarized above were not sufficient to constitute Respondent a constructive trustee, or to establish such fraud or concealment as are necessary as an exception to the running of the statute of limitations, and finally that in the absence of fraud equity can give no relief where the statute has tolled, and that a court of equity was bound to apply the theory of an analogy to the Statute of Limitations.

Reasons for Granting the Writ.

The question is one of gravity and importance in that a section of the statutes of the United States, Sec. 3226 R. S. whose purpose as construed by this court is for the convenience of the Commissioner of Internal Revenue in advis-

ing him of the demands or claims intended to be asserted, is being used to enable the government to retain large sums of money which the Commissioner coerced from citizens by his fraudulent and illegal act of falsifying a statute of the United States, (Act of Aug. 2, 1886 as amended) and concealing its falsification for a great many years by publishing the falsified section as a Regulation of his department, and then asserting said Sec. 3226 R. S. as a defense to a claim for restitution of said sums.

The decision of the Circuit Court of Appeals decides a Federal question in a way which is probably in conflict with the decisions of this court in *Bailey* v. *Glover*, 21 Wall. 342; 22 L. Ed. 636 and in *Kirby* v. *Lake Shore R. R. Co.*, 120 U. S. 130; 30 L. Ed. 569 in that denying any exception to Sec. 3226 R. S. it makes a statute which was designed to assist the Commissioner, a means of protecting him against his own fraudulent concealment of his falsification of a statute, and to make the statute of limitations, which was designed to prevent fraud, the means by which it is made successful and secure.

The case involves an important question of federal law, which has not, but should be decided by this court. This court has in several cases refused to grant an exception to Sec. 3226 R. S. In *Rock Island A. & L. R. R. Co.* v. *U. S.*, 254 U. S. 141, it required a technical compliance saying, "Men must turn square corners when they deal with the government", and that the words of the statute mark the conditions of the claimant's rights. *U. S.* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269. It has also held that the conditions of the statute may be waived by the commissioner and in *Tucker* v. *Alexander*, 275 U. S. 228, indicates that its construction may depend upon the insistence of the Commis-

sioner. It has also been held that the purpose of the statute is for the Commissioner's convenience and for his information. Nowhere has it ever been decided whether a court of equity should or could allow an exception where all of the facts were already within the knowledge of the Commissioner, and he had by his own fraud concealed them from the taxpayer until such time as he could claim the protection of Sec. 3226. Such question should be decided by this court, otherwise it leaves the way open for the Commissioner to legislate as he sees fit, and enforce such legislation in defiance of court decisions, with no remedy in the hands of the citizen by which he may recover.

The decision of the Circuit Court of Appeals decides a Federal question in a way which is probably in conflict with the decisions of this court in *Southern Pacific Company* v. *Bogert*, 250 U. S. 483; 63 L. Ed. 1099, and *Michaud et al* v. *Girod et al*, 4 How. 504, 561, 11 L. Ed. 1076, 1102 in that it holds that equity will not relieve because of the application of the theory of equity courts applying the analogy of the statute of limitations and giving no consideration to the circumstances of the case and the fact of actual fraud in which case this court has said that there can be found no case in the books where equity has failed to give relief.

The decision of the Circuit Court of Appeals decides a Federal question in a way which is probably in conflict with the spirit of the decision of this court in *Bull* v. *U. S.*, 295 U. S. 247, 261 in that it enables the United States to hold the money of an innocent party which has gone into the treasury by means of the fraud of their agent and the detention of which is immoral and amounts in law to a fraud on the taxpayer's rights.

The decision of the Circuit Court of Appeals decides

a Federal question in a way which is probably in conflict with the decision of this court in *Miller* v. *Standard Nut Margarine Co. of Florida,* 284 U. S. 498. This court there held that because of the exceptional and extraordinary circumstances surrounding the facts in the case, Sec. 3224 R. S. prohibiting the maintenance of any suit for the restraining of any tax did not apply. The peculiar facts in that case were the same as exist here and were that the Commissioner of Internal Revenue had knowingly enforced a statute which he had wilfully falsified and concealed the falsification by publishing it as a Regulation of his department and supplying it to all manufacturers of certain food products holding that they, under the falsified law were making oleomargarine. That business relied upon this statute and under it paid large sums into the treasury of the United States. When the falsification was finally discovered in 1929 suits were filed to restrain its further enforcement and injunctions issued by the District courts, which were ignored by the Commissioner. Claims for refund were filed and large sums returned, but in the case of Petitioner the provisions of Sec. 3226, were construed by the Commissioner to apply to sums paid in prior to 1925. When the first of these injunction cases reached this court it was held that the injunctions should be sustained, and that the lower court was correct in assuming equitable jurisdiction, notwithstanding the absolute provisions of Sec. 3224 R. S. Sec. 3224 and Sec. 3226 are part of the same legislation and have been held in *pari materia* and it is asserted by the Petitioner should both receive the same equitable construction, and that since this court held in the *Standard* case that because of the circumstances it constituted an exception to Sec. 3224 R. S. that they also constitute an exception to Sec. 3226 R. S. The court below refused to give an equitable construction to the statute and held that Petitioner could have no further relief since it had exhausted its legal remedies.

Conclusion.

The question here involved is not of interest merely to the Petitioner, but is of great interest to all taxpayers in their efforts to maintain their rights, and as a warning to officials that in their zeal to collect taxes they should not take the law into their own hands and usurp the functions of Congress and legislate as they thought the law should be, with the assurance that if the illegal acts were not discovered within a prescribed time the citizen could in no way assert his rights.

Prayer.

The Petitioner, the Dixie Margarine Company, prays that a Writ of Certiorari issue to review the decree of the Circuit Court of Appeals for the Sixth Circuit entered in this cause on December 1, 1943 (Rec. p. 25), (139 F. (2) 221), affirming the decree of the District Court for the Western District of Tennessee.

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